Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

SHERIFF, WASHOE COUNTY
AND THE STATE OF NEVADA,

Petitioners,

v.

ALICE MAE BURDG, KIT JEROME BURDG,
STEPHEN GLENN SANTILLANEZ AND
LARRY SHAWN EARLY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

1. Whether the possession of household items, such as iodine or pseudoephedrine, implicates a liberty interest under the due process clause that would prevent a state legislature from making it unlawful to possess the majority of such items if they could be used to manufacture a controlled substance.

2. Whether NRS 453.322(1)(b), which prohibits the possession of a majority of ingredients to manufacture a controlled substance, is vague and without any valid applications where the defendants in this case possessed a complete methamphetamine laboratory and all the ingredients necessary to manufacture methamphetamine and had actually manufactured methamphetamine.

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO
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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, the State of Nevada, Petitioner herein, by and through counsel, and files this Petition for a Writ of Certiorari seeking reversal of the Opinion of the Supreme Court of the State of Nevada.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Nevada Supreme Court is reproduced as Appendix A. Sheriff v. Burdg; State v. Santillanez, 118 Nev. Adv. Op. No. 86 (2002), dated December 20, 2002. The district court order in Sheriff v. Burdg, Case No. CR00-01877, dated June 6, 2001, is reproduced as Appendix B. The district court order in State v. Santillanez and Early, Case Nos. CR00-2216A and CR00-2216C, dated July 3, 2001, is reproduced as Appendix C.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is being filed within 90 days of the judgment of the Nevada Supreme Court, entered on December 20, 2002. Sup. Ct. R. 13. The jurisdiction of the Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The due process clause of the Fourteenth Amendment of the United States Constitution.

2. NRS 453.322 is reproduced as Appendix D.

STATEMENT OF THE CASE

On August 24, 2000, pursuant to a search warrant, police officers searched the Burdg property located in Sparks, Nevada. Appendix A. The State of Nevada alleged that the evidence presented at a preliminary hearing demonstrated the Burdgs had a complete methamphetamine laboratory on their property, including all the ingredients necessary to make methamphetamine, and had actually manufactured methamphetamine. Appendix E.

On September 28, 2000, police officers arrested Santillanez and Early. Appendix A. Pursuant to a search warrant, officers found iodine, ephedrine, pseudoephedrine, red phosphorus, hydrochloric acid, and methamphetamine on the property controlled by Santillanez and Early. Appendix A. The State of Nevada alleged that Santillanez and Early also possessed the equipment necessary to manufacture methamphetamine. Appendix F.

On June 6, 2001, the state district court granted the Burdgs' petitions for writs of habeas corpus, ruling that NRS 453.322(1)(b), which prohibits the possession of a majority of the ingredients required to manufacture a controlled substance, violates the due process clause of the Fourteenth Amendment to the United States Constitution because it is facially vague. Appendix A. On July 3, 2001, the district court granted Santillanez's and Early's motions to dismiss following its ruling in the Burdg case. Appendix A.

The State of Nevada appealed both cases. On

December 20, 2002, the Nevada Supreme Court affirmed the district court's rulings in a consolidated decision. Appendix A.

REASONS FOR GRANTING THE WRIT

THE NEVADA SUPREME COURT HAS DETERMINED A FEDERAL CONSTITUTIONAL ISSUE THAT IS NOT SUPPORTED BY THE CASE LAW OF THIS COURT.

The Nevada Supreme Court ruled that NRS 453.322(1) violates the Fourteenth Amendment to the United States Constitution because it "is vague" on its face. Appendix A. Specifically, the Court ruled the statute "is facially vague because it infringes on constitutionally protected conduct, is incapable of any valid applications, fails to provide sufficient notice of the prohibited conduct, and encourages arbitrary and discriminatory enforcement." Appendix A. The State of Nevada submits this Court should review the Nevada Supreme Court's ruling because no constitutionally protected activity is implicated in either the Burdg or Early/Santillanez cases or in NRS 453.322(1); NRS 453.322(1) is capable of valid application, as illustrated by the facts of the present cases; and therefore NRS 453.322(1) does not violate federal due process.

I

NRS 453.322(1)(b) DOES NOT INFRINGE ON CONSTITUTIONALLY PROTECTED CONDUCT.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness

that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983)(citations omitted). This Court has held one may assert a statute is facially vague when the statute implicates constitutionally protected conduct or if the statute "is impermissibly vague in all of its applications." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982).

Here, the Nevada Supreme Court ruled that NRS 453.322(1)(b) does infringe on constitutionally protected conduct. The Court concluded that because one may be convicted under the statute by merely possessing a few common household items without any intent to manufacture a controlled substance, "the statute infringes on an individual's liberty interest." Appendix A. However, there is no constitutionally protected liberty interest implicated by NRS 453.322(1)(b), or more specifically, with regard to the facts of this case. Although the statute criminalizes the possession of a certain quantity of substances which are not listed in the statute, without a specific intent to manufacture a controlled substance, the State of Nevada is unaware of any constitutionally defined liberty interest that one has to possess a majority of substances that could be used to manufacture a controlled substance, even if the substances, such as iodine, may be lawfully purchased on an individual basis. Where the possession of a substance is lawful at one point, the legislature may make it unlawful at the next. See Apprendi v. New Jersey, 530 U.S. 466, 484-87 (2000)(states are free to define the elements of, and defenses to, crimes); McMillan v.

Pennsylvania, 477 U.S. 79, 84-86 (1986); Brown v. Ohio, 432 U.S. 161, 165 (1977)("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

This is true even where the Nevada State Legislature did not include a specific intent to possess the substances for the purpose of manufacturing a controlled substance. "When a State's power to define criminal conduct is challenged under the Due Process Clause, we inquire only whether the law 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Montana v. Egelhoff, 518 U.S. 37, 58 (1996)(holding that states are free to define the mens rea element of crimes)(quoting Patterson v. New York, 432 U.S. 197, 202 (1977))(internal quotation marks omitted). Here, the ability to possess a certain substance is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In support of its ruling that NRS 453.322(1)(b) infringes on an individual's liberty interest, the Nevada Supreme Court cites Chicago v. Morales, 527 U.S. 41, 55 (1999). There, this Court justified using a facial-vagueness analysis of a Chicago ordinance requiring a police officer to give an order of dispersal upon observing a person whom he reasonably believed to be a street gang member loitering in a public place because the ordinance "is a criminal law that contains no mens rea requirement, [citations omitted] and infringes on constitutionally protected rights[.]" Id. This Court noted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Id. at 53.

Here, on the other hand, there is no liberty interest, in a constitutional sense, at issue. For this reason alone, the decision of the Nevada Supreme Court should be reversed.

II

NRS 453.322(1)(b) IS CAPABLE OF VALID APPLICATION.

The Nevada Supreme Court also ruled NRS 453.322(1)(b) is facially vague because it is incapable of any valid applications. That ruling is incorrect. While the Nevada Supreme Court does not explain or support its ruling, the very facts of the two cases involved here demonstrate otherwise. In the Burdg case, the Burdgs possessed all the equipment and ingredients necessary to make methamphetamine, and had actually made the drug. Appendix A; Appendix E. In the Santillanez/Early case, it appears the defendants possessed the ingredients and equipment necessary to make the drug as well. Appendix F. Where one actually possesses all the ingredients and equipment necessary to manufacture a controlled substance and intends to manufacture a controlled substance, that person necessarily also possesses a majority of the ingredients to manufacture a controlled substance, and is thus actually aware his conduct violates NRS 453.322(1)(b). In this instance, then, the statute has valid application.

As noted above, this Court has countenanced a facial-vagueness challenge to a statute that reaches "a substantial amount of constitutionally protected conduct." Hoffman Estates, 455 U.S. at 494 (1982); see e.g., Morales, supra; Kolender v. Lawson, 461 U.S. 352, 358 (1983)(California

statute requiring persons who loiter or wander the streets to provide a credible and reliable identification and to account for their presence when requested by a police officer attacked for vagueness because of potential of arbitrarily suppressing First Amendment liberties and constitutional right to freedom of movement involved). Where there is no constitutionally protected conduct at issue the Court may only review a statue for facial vagueness if the statute is impermissibly vague in all of its applications. See Hoffman Estates, supra. To determine whether a statute is vague in all of its applications, the statute must be judged in light of the defendant's conduct that is charged to be violative of the statute. See e.g., Hoffman Estates, 455 U.S. at 495, 505 (1982)("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law."; "We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.") (emphasis added); United States v. Mazurie, 419 U.S. 544, 550 (1975)("vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); United States v. Powell, 423 U.S. 87, 92-93 (1975); Parker v. Levy, 417 U.S. 733, 756 (1974)(noting that none of this Court's cases "suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct

which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973)(footnote omitted)("A person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the [c]ourt."); Kolender, 461 U.S. at 370-71 (1983)(White, J., dissenting)("If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack. . . . Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.").

As demonstrated above, the facts of both the Burdg and Santillanez/Early cases reveal conduct that is clearly violative of NRS 453.322(1)(b). Thus, the State of Nevada should be given the opportunity to prove that the defendants in the present cases were aware of that "unmistakable core" of conduct that any person would know violates NRS 453.322(1)(b). The place to prove that "core of conduct" is at trial. Cf., United States v. Saffo, 227 F.3d 1260, 1270 (10th Cir. 2000)("We hold that the evidence produced at trial demonstrated that Saffo is 'one to whose conduct [the] statute clearly applies': therefore she cannot successfully challenge the statute for vagueness."). If the State of Nevada can prove that any reasonable person would have known that his conduct violated NRS 453.322(1)(b), given the facts of either of the

present cases, then neither Burdg, Santillanez, or Early can hardly be heard to complain that while they knew they are guilty under the statute, because the statute is linguistically unclear, the statute thus fails to give them notice had they been innocent of any wrongdoing. The vagueness doctrine should be reserved for situations when it is unclear what a statute prohibits, as opposed to conduct that clearly violates a statute. Accordingly, the State of Nevada requests this Court to reverse and remand the cases to permit the State of Nevada to prosecute the defendants in order to prove that "unmistakable core" of conduct that a reasonable person would know violates NRS 453.322(1)(b).

CONCLUSION

For the reasons stated above, petitioner asks that a writ of certiorari to the Nevada Supreme Court issue and that the decision of the Nevada Supreme Court be reversed.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, WASHOE COUNTY, Appellant,
vs.
ALICE MAE BURDG AND KIT JEROME BURDG, Respondents.
_____/

No. 38105

THE STATE OF NEVADA, Appellant,
vs.
STEPHEN GLENN SANTILLANEZ AND LARRY SHAWN EARLY, Respondents.
_____/

No. 38264

Filed:
December 20, 2002

Consolidated appeals from district court orders concluding that NRS 453.322(1)(b) is unconstitutional. Second Judicial District Court, Washoe County; James W. Hardesty, Judge (No. 38105); Brent T. Adams, Judge (No. 38264).

Affirmed.

Frankie Sue Del Papa, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Joseph R. Plater III, Deputy District Attorney, Washoe County,
for Appellants.

Walter B. Fey, Reno,
for Respondent Kit Jerome Burdg.

Marc P. Picker, Reno,
for Respondent Alice Mae Burdg.

M. Jerome Wright, Reno,
for Respondent Stephen Glenn Santillanez.

Steven G. McGuire, Public Defender, James P. Logan, Chief Deputy Public Defender, and Paul C. Giese, Deputy Public Defender, Carson City,
for Respondent Larry Shawn Early.

BEFORE THE COURT EN BANC.

OPINION

PER CURIUM:

In these consolidated appeals we consider the constitutionality of NRS 453.322(1)(b), which criminalizes possession of a majority of the ingredients required to manufacture a controlled substance. The district court granted respondents Kit Jerome Burdg's and Alice Mae Burdg's petitions for writs of habeas corpus (No. 38105) and granted respondents Stephen Glenn Santillanez's and Larry Shawn Early's motions to dismiss (No. 38264). In both orders, the district court found NRS 453.322(1)(b) to be void for vagueness, and therefore, unconstitutional. We agree and affirm the district court's ruling.

FACTS

Kit and Alice Burdg

Detective Tim Kuzanek of the Washoe County Sheriff's Office, who was assigned to the Consolidated Narcotics Unit, received information in late 1998 and early 1999 about a

methamphetamine manufacturing operation at 294 East Ninth Street in Sun Valley. Based on this information, on August 24, 2000, Detective Kuzanek examined the garbage from the property. This revealed several items that are commonly seen at methamphetamine operations, including a possible chemical bottle and ph papers, which are used to test acidic or base levels when manufacturing methamphetamine. Using this evidence, Detective Kuzanek obtained a search warrant for the property, which belonged to Kit Burdg.

That same day, law enforcement officers conducted a search of the property. During the search, law enforcement officers found several items in a shed that was located on the property, including flasks, funnels, scales, gloves, stained rags, ph papers, a hot plate, duct tape, coffee filters, aspirin, and electric fan, razor blades, plastic bottles, drug paraphernalia, jars, matches without striker plates, ephedrine tablets, a bottle of hydrogen peroxide, a butane torch, a can of Coleman fuel, bottles of Red Devil lye, a bottle suspected of containing iodine, a container suspected of containing acid, and a can suspected of containing acetone. Officers also found in the shed papers with Kit's name and a "pay and owe" sheet.[1] Notably, a presumptive chemical test conducted on some white powder obtained from the property was positive for the presence of pseudoephedrine, a chemical used to manufacture

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[1]Officer Steve O' Farrell, who participated in the execution of the search warrant, testified at the preliminary hearing that a "pay and owe sheet" is "a list that people would make for monies owed or product [controlled substance] given out."

methamphetamine.

Kit Burdg voluntarily turned himself in following the search, and he was arrested. Alice Burdg, Kit's wife, was arrested soon thereafter.

Alice and Kit Burdg were charged with the crime of possession of a majority of the ingredients required to manufacture a controlled substance, a felony violation under NRS 453.322(1)(b). On September 25, 2000, a preliminary hearing was held. At the preliminary hearing there was conflicting testimony regarding the ingredients required to manufacture methamphetamine. Detective Kuzanek testified that he had made methamphetamine under laboratory conditions, using "red phosphorus, iodine, ephedrine or pseudoephedrine, Coleman fuel, muriatic acid, [and] Red Devil lye." Christopher Adduci, an agent for the Drug Enforcement Administration, testified that "two or three substances are adequate" to manufacture methamphetamines. Agent Adduci testified that the ingredients used to manufacture methamphetamine were not themselves controlled substances, but were "common substances," consisting of pseudoephedrine (an ingredient in many common household cold/flu medicines), red phosphorus (which can be extracted from common household matches), and iodine. He also indicated that "there can be others," but he could not testify as to what other chemical substances were needed. After the preliminary hearing, Alice and Kit were bound over on the charged crime.

On November 13, 2000, Kit filed a pretrial petition for writ of habeas corpus, arguing among other things that NRS 453.322(1)(b) is unconstitutionally overbroad and vague. Alice joined in Kit's petition, adopting his argument, but she

added an additional argument-the State failed to present any evidence that Alice resided on the property when the raid occurred. On June 6, 2001, the district court granted the Burdgs' petitions for writs of habeas corpus, ruling that NRS 453.322(1)(b) is void for vagueness, and therefore is unconstitutional.

Stephen Santillanez and Larry Early

On September 28, 2000, the Washoe County Consolidated Narcotics Unit arrested Stephen Glenn Santillanez and Larry Shawn Early. They too were charged with possession of a majority of the ingredients required to manufacture a controlled substance in violation of NRS 453.322(1)(b). The specific controlled substance was methamphetamine.

On May 10, 2001, Santillanez and Early filed motions to dismiss, arguing that NRS 453.233(1)(b) is unconstitutionally vague and overbroad. In its opposition to the motions, the State made an offer of proof regarding the evidence it believed supported the charge. The State proffered that several bottles and other containers were recovered during the execution of a search warrant for the premises controlled by Santillanez and Early. Chemical samples were tested at the Washoe County Crime Lab, and the test revealed the following chemicals: iodine, ephedrine, pseudoephedrine, red phosphorus, hydrochloric acid, and methamphetamine. On July 3, 2001, the district court granted Santillanez's and Early's motions to dismiss following its ruling in the Burdg case. The State appealed both rulings. We consolidated the two appeals.

DISCUSSION

NRS 453.322(1)(b) provides that it is unlawful for a

person to "[p]ossess a majority of the ingredients required to manufacture or compound a controlled substance other than marijuana, unless he is at a laboratory that is licensed to store such ingredients." The district court held that the statute is void for vagueness because "[i]t is a criminal statute which contains no mens rea requirement, and infringes on an individual's liberty interest" and further, because "the statute does not provide sufficiently specific limits on the enforcement discretion of the police." The State challenges the district court's ruling on two grounds: the district court did not determine whether the statute is vague as applied to the defendants (in both cases), and the district court failed to address whether the statute is vague in all of its applications.

Resolution of these appeals involves the constitutionality of a statute, which is a question of law that this court reviews de novo.[2] This court has stated, "[s]tatutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality."[3] To overcome this burden, there must be a "clear showing" of invalidity.[4]

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[2]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[3]Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991).

[4]Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

"The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the due process clause of the Fourteenth Amendment to the United States Constitution."[5] A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement.[6] The Supreme Court has also held that a facial-vagueness challenge is appropriate when the statute implicates constitutionally protected conduct or if the statute "is impermissibly vague in all of its applications."[7] But "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[8]

Under any of the tests noted above, we conclude that

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[5]Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975); see also Cunningham v. State, 109 Nev. 569, 570, 855 P.2d 125, 125 (1993)(stating that a statute that does not give fair notice of prohibited conduct, "is violative of the Due Process Clause, Article 1, Section 8 of the Nevada Constitution").

[6]Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[7]Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497 (1982); accord Martin, 99 Nev. at 340, 662 P.2d at 637.

[8]Martin, 99 Nev. at 340, 662 P.2d at 637.

a facial-vagueness challenge is appropriate. More specifically, we conclude that NRS 453.322(1)(b) is facially vague because it infringes on constitutionally protected conduct, is incapable of any valid applications, fails to provide sufficient notice of the prohibited conduct, and encourages arbitrary and discriminatory enforcement. First, this criminal statute contains no intent element, and consequently the statute imposes criminal sanctions on what is otherwise non-criminal activity. We recognize that the "evil" that NRS 453.322(1)(b) addresses is clearly the manufacturing of controlled substances, and the statute is not meant to convict a person simply because that person possesses a combination of a few common household items. But without an intent element, the statute infringes on an individual's liberty interest.[9]

During oral argument, the State asserted that it is common practice to build in a mens rea requirement when a statute is not explicit. However, we note that the general intent statute, NRS 193.190, does not alleviate the absence of an intent element in NRS 453.322(1)(b) because it is unclear where an intent element would be implied. For instance, the statute at issue is missing not only the intent to possess a

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[9]Cf. Chicago v. Morales, 527 U.S. 41, 55 (1999) (Stevens, J., concurring) (applying a facial-vagueness analysis to a Chicago ordinance that required a police officer to give an order of dispersal upon observing a person whom he reasonably believed to be a street gang member loitering in a public place with one or more persons because the ordinance "is a criminal law that contains no mens rea requirement, and infringes on constitutionally protected rights" (citations omitted)).

majority of the ingredients required to manufacture, but more significantly, the intent to possess those ingredients for the purpose of manufacturing a controlled substance.

In addition to missing an intent element, the statute fails to provide a person of ordinary intelligence with fair notice of what conduct is prohibited. In particular, it fails to list the items that might be described as "ingredients" required to manufacture or compound a controlled substance. An "ingredient" is commonly defined as "something that enters into a compound or is a component part of any combination or mixture."[10] The legislative history of NRS 453.322(1)(b) indicates that the Legislature enacted the statute because of concerns regarding methamphetamine labs. The Assembly Committee on Judiciary was presented with an exhibit titled "Methamphetamine Lab Indicators," which, according to the committee's minutes, was a list of ingredients of methamphetamine.[11] However, that list includes items other than those that would fit the common definition of "ingredients," such as pots and pans, tubing, funnels, buckets, bottles, and coffee grinders and filters.[12] The list does not indicate what "ingredients" are required to manufacture a controlled substance such as methamphetamine.

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[10]Webster's Collegiate Dictionary 622 (9th ed. 1985).

[11]Hearing on A.B. 454 Before the Assembly Comm. on Judiciary, 70th Leg,. 15 & ex. F (Nev., March 19, 1999).

[12]Id. ex. F.

Moreover, we conclude that the absence of an intent element and the ambiguities regarding the required ingredients allow arbitrary and discriminatory enforcement. Thus, NRS 453.322(1)(b), as written, fails to provide law enforcement with adequate guidance concerning the precise scope of activities it aspires to proscribe.

Because we conclude that NRS 453.322(1)(b) is facially vague, we need not address the State's remaining arguments concerning overbreadth and an as-applied analysis. For the same reason, we need not address the Burdgs' sufficiency of the evidence argument.

CONCLUSION

We hold that NRS 453.322(1)(b) is void for vagueness on its face. Therefore, NRS 453.322(1)(b) violates the Fourteenth Amendment to the United States Constitution, and Article 1, Section 8 of the Nevada Constitution. Accordingly, we affirm the district court's order declaring NRS 453.322(1)(b) unconstitutional.

s/Young, C.J.
Young

s/Maupin, J.
Maupin

s/Shearing, J.
Shearing

s/Agosti, J.
Agosti

s/Rose, J.
Rose

s/Leavitt _____, J.
Leavitt

s/Becker _____, J.
Becker

APPENDIX B

CODE 4325

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

THE STATE OF NEVADA, Plaintiff, v. ALICE MAE BURDG, KIT JEROME BURDG, Defendants. _____/	Case No. CR00-01877 Dept. No. 9 Filed: June 6, 2001

ORDER

Defendants Alice Mae Burdg and Kit Jerome Burdg (hereinafter collectively referred to as "Defendants") were charged with a violation of NRS § 453.322(1)(b). Said statute states, in relevant part:

> 1. Except as authorized by the provisions of NRS § 453.011 to § 453.552, inclusive, it is unlawful for a person to:
>
> (b) Possess a majority of the ingredients required to manufacture or compound a controlled substance other than marijuana, unless he is at a laboratory that is licensed to store such ingredients.

NRS § 453.322(1)(b).

Defendants have filed a Petition for Writ of Habeas Corpus (Pre-Trial) challenging the constitutionality of this

statute.

The thrust of Defendants' argument is that the statute sweeps too broadly and criminalizes conduct that was not intended to be proscribed by the Legislature. Defendants contend that many common household items could be used to produce methamphetamine, and the mere possession of these items, without any intent to produce methamphetamine should not result in criminal conduct. Defendants further argue the statute does not require any element of intent, i.e. simple possession of a combination of a few common household items would constitute a felony.

Christopher Adduci, a Special Agent with the Drug Enforcement Administration, testified that as few as two to three ingredients could be used to manufacture methamphetamine. Preliminary Hearing Transcript at p. 136. He further revealed that the ingredients were not, themselves, controlled substances, but were "common substances." Id.

The testimony revealed that methamphetamine can be produced with as few ingredients as pseudoephedrine (an ingredient in may common household cold/flu medicines), red phosphorus (which can be extracted from common household matches) and iodine.

The statute, as it stands, without any element of intent to manufacture subjects many law abiding Nevadans to criminal prosecution simply because they have in their homes matches and cold medicine. This cannot be what the Legislature meant to do.

The State responds that an element of intent is present in the statute because it is used and enforced only against those the state believes have the requisite intent. The State

further contends that the general intent jury instructions would operate to vindicate the rights of any innocent defendant who simply owned the ingredients but had no intent to manufacture a controlled substance.

That interpretation would, however, force an innocent person to defend a criminal action for conduct that the legislature clearly did not intend to proscribe. Such an overbroad application of a statute would infringe on the individual's liberty interest. See Delaware v. Baker, 720 A.2d 1139, 1146 (Delaware Supreme Court 1998). While there is no showing that this statute has been applied in an overbroad manner, the language of the statute itself is sufficiently vague to allow such application.

The State further argues that the Legislature, as shown in the Legislative history, was concerned that intent be an element of this crime. In the legislative history one legislator asked a testifying expert if a store owner who had a majority of ingredients legally in stock could face prosecution under this statute, and the expert testified that "Intent is a major part of the bill."
Minutes of the Assembly Committee on Judiciary, March 19, 1999.

While this Court applauds the Assembly for being concerned that this statute would be applied in a constitutional manner, the language that the Assembly approved is too vague to meet constitutional standards.

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Indeed, the United States Supreme Court held that the requirement that a legislature establish minimal guidelines to govern law enforcement was the more important aspect of the vagueness doctrine. Id at 358.

This concern for minimal guidelines goes as far back as 1876, where the United States Supreme Court held:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

United States v. Reese, 92 U.S. 214, 221 (1876).

NRS § 453.322(1)(b), casts such a net. It is a criminal statute which contains no *mens rea* requirement, and infringes on an individual's liberty interest. Colautti v. Franklin, 439 U.S. 379, 391, 395 (1983).

Further, the statute does not provide sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards for definiteness and clarity. Chicago v. Morales, 527 U.S. 41, 64 (1999). NRS § 453.322(1)(b) is therefore unconstitutional and void-for-vagueness.

Accordingly, Defendants' Petitions for Writ of Habeas Corpus are granted.

DATED this 6 day of June, 2001.

s/James W. Hardesty
JAMES W. HARDESTY
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I deposited for mailing in the United States mail, postage prepaid, a true and correct copy of the attached document addressed to:

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By s/Lawry Walker Dated 6/6/01

APPENDIX C

CODE 3060

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff, Case No. CR00-2216A
CR00-2216C

vs. Dept. No. 6

STEPHEN GLENN SANTILLANEZ,
LARRY SHAWN EARLY, Filed:

Defendants. July 3, 2001

_____/

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS

The Court has read and considered the memoranda and exhibits submitted in support of and in opposition to defendants Stephen Glenn Santillanez and Larry Shawn Early's motions to dismiss filed on May 10, 2001, and submitted for decision on June 18, 2001.

Accordingly, the motions to dismiss are granted pursuant to the ruling by Judge Hardesty in The State of NV v. Alice Mae Burdg and Kit Jerome Burdg, case number CR00-01877.

Dated this 2nd day of July, 2001.

s/B. Adams
District Judge

APPENDIX D

NRS 453.322 Offer, attempt or commission of unauthorized act relating to manufacture or compounding of certain controlled substances unlawful; penalty; prohibition against probation of offenders.

1. Except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to:

(a) Manufacture or co npound a controlled substance other than marijuana;

(b) Possess a majority of the ingredients required to manufacture or compound a controlled substance other than marijuana, unless he is at a laboratory that is licensed to store such ingredients; or

(c) Offer or attempt to do any act set forth in paragraph (a) or (b).

2. Unless a greater penalty is provided in NRS 453.3385 or 453.3395, a person who violates the provisions of subsection 1 is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 3 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $100,000.

3. The court shall not grant probation to a person convicted pursuant to this section.

(Added to NRS by 1999, 2636)

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, WASHOE COUNTY,
Appellant,

v.

ALICE MAE BURDG AND KIT JEROME BURDG,
Respondents.

No. 38105

Filed:
September 24, 2001

/

APPELLANT'S OPENING BRIEF

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ATTORNEYS FOR RESPONDENTS

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, WASHOE COUNTY,

Appellant,

v.

ALICE MAE BURDG AND
KIT JEROME BURDG,

No. 38105

Respondents.

_____/

APPELLANT'S OPENING BRIEF

I. STATEMENT OF THE ISSUES

A. WHETHER THE DISTRICT COURT ERRED IN DECLARING NRS 453.322(1)(B), WHICH PROHIBITS THE POSSESSION OF A MAJORITY OF THE INGREDIENTS REQUIRED TO MANUFACTURE A CONTROLLED SUBSTANCE, UNCONSTITUTIONALLY OVERBROAD, WHERE THE OVERBREADTH DOCTRINE APPLIES ONLY TO FIRST AMENDMENT ISSUES.

B. WHETHER THE DISTRICT COURT ERRED IN DECLARING 453.322(1)(b)VOID-FOR-VAGUENESS WHERE THE DISTRICT COURT FAILED TO CONSIDER THE STATUTE AS APPLIED TO THE DEFENDANTS, AND WHERE THE EVIDENCE AT THIS POINT REVEALS THAT THE DEFENDANTS POSSESSED A

COMPLETE LABORATORY TO MAKE METHAMPHETAMINE, POSSESSED SUFFICIENT INGREDIENTS TO MAKE METHAMPHETAMINE, AND HAD ACTUALLY MANUFACTURED METHAMPHETAMINE.

II. STATEMENT OF THE CASE

This case arises from the district court's order granting the Burdgs' petition for writ of habeas corpus (Supplemental Appendix, 1-3). Specifically, the district court ruled that NRS 453.322(1)(b), which prohibits the possession of a majority of the ingredients required to manufacture a controlled substance, is overbroad and void for vagueness. Id. The district court filed its order on June 6, 2001, and the State filed a timely notice of appeal on June 26, 2001 (Record on Appeal II, 419-20; hereafter "ROA")). See NRS 34.575(2)(providing that the State may appeal to the Supreme Court from an order granting a writ of habeas corpus); NRAP 4(b)(providing that when the State is authorized to appeal, it must file a notice of appeal within 30 days).

III. STATEMENT OF FACTS

Deputy Sheriff Tim Kuzanek received information in 1998 and 1999 "about a methamphetamine manufacturing operation that was taking place at 294 East Ninth Street in Sun Valley." (ROA I, 55-56, 68-69). Kuzanek learned that people at that location had been purchasing things used to manufacture methamphetamine. Id. at 56. Accordingly, on August 24, 2000, Kuzanek did a "trash run" at the Burdg property to see if there were signs of manufacturing

methamphetamine in the Burdgs' garbage. Id. at 56-57.[1] Kuzanek found a number of things in the Burdgs' garbage consistent with a methamphetamine operation, including PH litmus papers and possible chemical bottles. Id. at 58-59. Based on this, Kuzanek obtained a search warrant for the Burdg property. Id. at 62-63.

On August 24, 2000, pursuant to the search warrant, police officers found a complete methamphetamine laboratory in a shed on the Burdg property (ROA I, 14, 17-18, 38-39, 63, 64, 93-98. Specifically, officers found flasks, funnels, scales, gloves, stained rags, PH papers, a hot plate, duct tape, coffee filters, aspirin, an electric fan, razor blades, plastic bottles, drug paraphernalia, jars, matches without striker plates, 60 Ephedrine tablets, a bottle of hydrogen peroxide, a butane blow torch, a can of Coleman fuel, bottles of Red Devil lye, a bottle of suspected iodine, a container of suspected acid, and a can of suspected acetone. Id. at 94, 96, 98, 99, 169, 171, 172, 173, 174. Officers also found papers in the shed in the name of Kit Burdg and a "pay and owe" sheet, a list of monies owed for methamphetamine that had been given out. Id. at 110, 160. The Burdgs possessed all the equipment and ingredients necessary to make methamphetamine. Id. at 116,

[1]In a "trash run" law enforcement officers ensure that residents of a certain area put their trash on the sidewalk when it is to be picked up by the disposal company. Before the garbage truck arrives at the residence whose garbage may contain evidence of a crime, the truck clears its "hopper", and the suspected garbage is then put in the hopper. Id. The truck is driven down the street, where it is met by police officers. Id. Officers then search the garbage. Id.

141, 176.

After Kit Burdg was arrested, Kuzanek overheard him tell his brother on the jail phone that a woman had asked Kit if he had any crank. Id. at 84. Kit told the woman that he did not, but that he could get some. Kit "then indicated he went to the shed, scratched some off of a coffee filter, returned to her and gave it to her." Id. Kit indicated in another phone call that he had put the methamphetamine laboratory in the shed. Id. at 117-118, 123. After Alice Burdg was arrested, she told Kuzanek that she had packed various items used in manufacturing methamphetamine. Id. at 85-86.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The constitutionality of a statute is reviewed de novo. See United States v. Carlson, 87 F.3d 440, 443 (1996)(11th Cir. 1996)(whether statute is unconstitutionally vague reviewed under de novo standard); United States v. Saffo, 227 F.3d 1260, 1267 (10th Cir. 2000).

B. THE DISTRICT COURT ERRED IN USING OVERBREADTH ANALYSIS WHERE THIS CASE DOES NOT INVOLVE FIRST AMENDMENT ISSUES.

Although the district court specifically found NRS 453.322(1)(b) void-for-vagueness, and thus unconstitutional, the district court also employed an overbreadth analysis. Specifically, the district court found the statute overbroad because it criminalizes conduct contrary to the intent of the Legislature (Supplemental Appendix, 2). The district court found that the mere possession of cold medicine and matches,

which can be used in making methamphetamine, subjects "many law abiding Nevadans to criminal prosecution" even if they had no criminal intent to manufacture methamphetamine. Id. The State submits that the overbreadth doctrine does not apply to the instant case.

"Generally, an overbreadth challenge to the validity of a statute or ordinance has application only if First Amendment rights are implicated." Techtow v. City Council of North Las Vegas, 105 Nev. 330, 331, 775 P.2d 227, 228 (1989)(rejecting overbreadth challenge to ordinance regulating massage parlors because "the ordinance under question impairs none of Techtow's First Amendment freedoms."); State, Private Investigator's Licensing Bd. v. Taketa, 105 Nev. 4, 6, 767 P.2d 875, 876 (1989)(finding statute that precluded employment as private investigators of non-licensed persons convicted of a felony not subject to overbreadth analysis because "overbreadth analysis is not applicable to a statute such as the one at issue, which pertains to social welfare and which does not disrupt first amendment rights."); Spilotro v. State, ex rel. Nevada Gaming Com'n, 99 Nev. 187, 193, 661 P.2d 467, 471 (1983)(statutes authorizing exclusion of certain persons from licensed gaming establishments not overbroad because they "are not in any way directed toward the regulation of speech or association, and do not infringe on any First Amendment rights."); State v. Glusman, 98 Nev. 412, 422, 651 P.2d 639, 646 (1982)(challenge to gaming statute denied on overbreadth grounds because statue does not impact First Amendment freedoms).

The United States Supreme Court has taken the same view. See City of Chicago v. Morales, 527 U.S. 41, 52-53

(1999)(rejecting an overbreadth analysis against a city ordinance that did not prohibit speech); United States v. Salerno, 481 U.S. 739, 745 (1987)("we have not recognized an 'overbreadth doctrine outside the limited context of the First Amendment."); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)("facial overbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate State interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168 (1972)("[w]hile the doctrine of 'over-breadth' has been held . . . to accord standing by reason of the 'chilling effect' that a particular law might have upon the exercise of the First Amendment rights, that doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment.").[2]

Here, the district court found NRS 453.322(1)(b) overbroad because the statute could be used to prosecute innocent citizens: "While there is no showing that this statue has been applied in an overbroad manner, the language of the

---

[2]The federal courts have followed this practice as well. See United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999); West v. Derby Unified School Dist. No. 260, 206 F.3d 1358, 1367 (10th Cir. 2000); Nunez v. City of San Diego, 114 F.3d 935, 949 n.11 (9th Cir. 1997); Schultz v. City of Cumberland, 228 F.3d 831, 848 (7th Cir. 2000); Grendell v. Ohio Supreme Court, 252 F.3d 828, 834 (6th Cir. 2001); United States v. Kalb, 234 F.3d 827, 834 (3d Cir. 2000).

statute itself is sufficiently vague to allow such application." (Supplemental Appendix, 2). The State submits that because the manufacture of methamphetamine does not implicate First Amendment concerns, or any constitutional concern for that matter, the district improperly used the overbreadth doctrine. Further, "this Court will not decide the constitutionality of a statute based upon a supposed or hypothetical case which might arise thereunder." Carlisle v. State, 98 Nev. 128, 131, 642 P.2d 596, 598 (1982); Sereika v. State, 114 Nev. 142, 150, 955 P.2d 175, 180 (1998) ("Given the general presumption that statutes will be interpreted in compliance with the Constitution, we decline to strike down an otherwise valid statute based on the unsubstantiated possibility of unconstitutional enforcement."); Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973)(footnote omitted)("A person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the [c]ourt." Accordingly, the district court improperly used an overbreadth analysis in reviewing the statute at issue here.

C. THE DISTRICT COURT INCORRECTLY APPLIED THE VOID-FOR-VAGUENESS DOCTRINE WHERE IT FAILED TO DETERMINE WHETHER NRS 453.322(1)(B) IS SUFFICIENTLY CLEAR AS APPLIED TO THE DEFENDANTS IN THIS CASE.

The district court also determined that NRS 453.322(1)(b) is unconstitutional because of its vagueness. Although the order is not entirely clear, it appears the district

court reasoned that the statute is unconstitutionally vague because it contains no mens rea element, which thus, "infringes on an individual's liberty interest." (Supplemental Appendix, 3). Apparently, the district court meant--as it did in its overbreadth analysis-- that without a specific intent to possess certain ingredients for the express purpose of manufacturing methamphetamine, many people would, who had no such intent, be prosecuted contrary to the intent of the Legislature; and thus, the statute would create arbitrary and discriminatory enforcement. The State objects to the district court's analysis on two grounds.

First, the district court failed to determine whether NRS 453.322(1)(b) is vague as applied to the defendants in this particular case. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983)(citations omitted). However, "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975); see also United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963)("[i]n determining the sufficiency of the notice a statute must, of necessity, be examined in the light of the conduce with which a defendant is charged"). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974); see also Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455

U.S. 489, 495 (1982)("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law"). As Nevada has described it, "statutes challenged for vagueness are evaluated on an as-applied basis where, as here, first amendment interests are not implicated." Lyons v. State, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989).

Here, the district court failed to determine whether the Burdgs' conduct was sufficient to violate NRS 453.322(1)(b). Normally, a trial is required to determine whether a defendant's conduct has violated the law. See, e.g., United States v. Saffo, 227 F.3d 1260, 1270 (10th Cir. 2000)("We hold that the evidence produced at trial demonstrated that Saffo is 'one to whose conduct [the] statute clearly applies'; therefore she cannot successfully challenge the statute for vagueness."). Here, however, the facts presented at the preliminary hearing show that the Burdgs possessed a complete methamphetamine laboratory and all the ingredients necessary to make the drug. Thus, this is not a situation where the Burdgs "could not reasonably understand that [their] contemplated conduct is proscribed." Parker v. Levy, 417 U.S. 733, 757 (1974)(quoting United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963)). Since the Burdgs' conduct violates NRS 453.322(1)(b), this Court should reverse the district court order granting habeas relief and remand the case to the district court for trial.

Finally, "[s]tatutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their

unconstitutionality." Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991). In vagueness challenges, a statute may be struck down as vague on its face only if it is impermissibly vague in all of its applications. Hoffman Estates, 455 U.S. at 494-95. Here, the district court failed to demonstrate there is no case where a person of average intelligence would not understand that the substances he possesses are a majority of ingredients required to manufacture a controlled substance and that it is unlawful to possess those ingredients.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to reverse the district court's order and to remand the case to the district court for trial.

DATED: September 21, 2001.

RICHARD A. GAMMICK
District Attorney

By s/Joseph R. Plater
JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21 day of September, 2001.

s/Joseph R. Plater
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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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DATED: September 21, 2001

s/Linda Clayton

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,

v.

STEPHEN GLENN SANTILLANEZ AND LARRY SHAWN EARLY,
Respondents.

No. 38264

Filed:
November 26,2001

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,

v.

STEPHEN GLENN SANTILLANEZ AND LARRY SHAWN EARLY,

No. 38264

Respondents.

/

APPELLANT'S OPENING BRIEF

I. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED IN DECLARING NRS 453.322(1)(b), WHICH PROHIBITS THE POSSESSION OF A MAJORITY OF THE INGREDIENTS REQUIRED TO MANUFACTURE A CONTROLLED SUBSTANCE, UNCONSTITUTIONALLY OVERBROAD, WHERE THE OVERBREADTH DOCTRINE APPLIES ONLY TO FIRST AMENDMENT ISSUES.

B. WHETHER THE DISTRICT COURT ERRED IN DECLARING 453.322(1)(b) VOID-FOR-VAGUENESS WHERE THE DISTRICT COURT FAILED TO CONSIDER THE STATUTE AS APPLIED TO THE DEFENDANTS, AND WHERE THE STATE MADE AN OFFER OF PROOF THAT THE DEFENDANTS POSSESSED A COMPLETE METHAMPHETAMINE LABORATORY AND SUFFICIENT INGREDIENTS TO

MAKE METHAMPHETAMINE, AND HAD ACTUALLY MANUFACTURED METH-AMPHETAMINE.

II. STATEMENT OF THE CASE

On December 7, 2000, the State filed an information charging the respondents with possession of a majority of the ingredients to manufacture a controlled substance, to wit, methamphetamine, a violation of NRS 453.322 (Joint Appendix 1-3; hereafter "JA"). On July 3, 2001, the district court dismissed the charge pursuant to respondents' motion to dismiss. Id. at 108-09. The State filed a timely notice of appeal on July 30, 2001. Id. at 110-11.

III. STATEMENT OF THE FACTS

The defendants were charged by way of an information in the district court with possession of a majority of the ingredients to manufacture a controlled substance. The district court dismissed the charge based on the reasoning of another district court judge who had determined in an unrelated case that NRS 453.322(1)(b) is unconstitutionally overbroad and vague. Id. at 108-09; 82-85. This appeal follows.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The constitutionality of a statute is reviewed de novo. See United States v. Carlson, 87 F.3d 440, 443 (1996)(11th Cir. 1996)(whether statute is unconstitutionally vague reviewed under de novo standard).

B. THE DISTRICT COURT ERRED IN USING OVERBREADTH ANALYSIS WHERE THIS CASE DOES NOT INVOLVE FIRST AMENDMENT ISSUES.

Although the district court specifically found NRS 453.322(1)(b) void-for-vagueness, and thus unconstitutional, the district court also employed an overbreadth analysis. Specifically, the district court found the statute overbroad because it criminalizes conduct contrary to the intent of the Legislature (JA, 83). The district court found that the mere possession of cold medicine and matches, which can be used in making methamphetamine, subjects "many law abiding Nevadans to criminal prosecution" even if they had no criminal intent to manufacture methamphetamine. Id. The State submits that the overbreadth doctrine does not apply to the instant case.

"Generally, an overbreadth challenge to the validity of a statute or ordinance has application only if First Amendment rights are implicated." Techtow v. City Council of North Las Vegas, 105 Nev. 330, 331, 775 P.2d 227, 228 (1989)(rejecting overbreadth challenge to ordinance regulating massage parlors because "the ordinance under question impairs none of Techtow's First Amendment freedoms."); State, Private Investigator's Licensing Bd. v. Taketa, 105 Nev. 4, 6, 767 P.2d 875, 876 (1989)(finding statute that precluded employment as private investigators of non-licensed persons convicted of a felony not subject to overbreadth analysis because "overbreadth analysis is not applicable to a statute such as the one at issue, which pertains to social welfare and which does not disrupt first amendment rights."); Spilotro v. State, ex rel. Nevada Gaming Com'n, 99 Nev. 187, 193, 661 P.2d 467, 471 (1983)(statutes authorizing exclusion of certain persons from licensed gaming establishments not overbroad because they "are not in any way directed toward the regulation of speech or association, and do not infringe on any First Amendment rights."); State v. Glusman, 98 Nev. 412, 422, 651 P.2d 639, 646 (1982)(challenge to gaming statute denied on overbreadth

grounds because statute does not impact First Amendment freedoms).

The United States Supreme Court has taken the same view. See City of Chicago v. Morales, 527 U.S. 41, 52-53 (1999)(rejecting an overbreadth analysis against a city ordinance that did not prohibit speech); United States v. Salerno, 481 U.S. 739, 745 (1987)("we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)("facial overbreadth adjudication . . . attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate State interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168 (1972)("[w]hile the doctrine of 'over-breadth' has been held . . . to accord standing by reason of the 'chilling effect' that a particular law might have upon the exercise of the First Amendment rights, that doctrine has not been applied to constitutional litigation in areas other than those relating to the First Amendment.").[1]

Here, the district court found NRS 453.322(1)(b) overbroad because the statute could be used to prosecute innocent citizens: "While there is no showing that this statute has been applied in an overbroad manner, the language of the statute itself is sufficiently vague to allow such application."

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[1]The federal courts have followed this practice as well. See United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999); West v. Derby Unified School Dist. No. 260, 206 F.3d 1358, 1367 (10th Cir. 2000); Nunez v. City of San Diego, 114 F.3d 935, 949 n.11 (9th Cir. 1997); Schultz v. City of Cumberland, 228 F.3d 831, 848 (7th Cir. 2000); Grendell v. Ohio Supreme Court, 252 F.3d 828, 834 (6th Cir. 2001); United States v. Kalb, 234 F.3d 827, 834 (3d Cir. 2000).

(JA, 83). The State submits that because the manufacture of methamphetamine does not implicate First Amendment concerns, or any constitutional concern for that matter, the district improperly used the overbreadth doctrine. Further, "this Court will not decide the constitutionality of a statute based upon a supposed or hypothetical case which might arise thereunder." Carlisle v. State, 98 Nev. 128, 131, 642 P.2d 596, 598 (1982); Sereika v. State, 114 Nev. 142, 150, 955 P.2d 175, 180 (1998)("Given the general presumption that statutes will be interpreted in compliance with the Constitution, we decline to strike down an otherwise valid statute based on the unsubstantiated possibility of unconstitutional enforcement."); Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973)(footnote omitted)("A person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the [c]ourt." Accordingly, the district court improperly used an overbreadth analysis in reviewing NRS 453.322(1)(b).

C. THE DISTRICT COURT INCORRECTLY APPLIED THE VOID-FOR-VAGUENESS DOCTRINE WHERE IT FAILED TO DETERMINE WHETHER NRS 453.322(1)(b) IS SUFFICIENTLY CLEAR AS APPLIED TO THE DEFENDANTS IN THIS CASE.

The district court also determined that NRS 453.322(1)(b) is unconstitutional because of its vagueness. It appears the district court reasoned that the statute is unconstitutionally vague because it contains no mens rea element (JA, 84). Apparently, the district court meant--as it did in its overbreadth analysis--that without a statutory requirement of specific intent to possess certain ingredients for the express purpose of manufacturing methamphetamine, many people would, who had no intent to make methamphetamine, be prosecuted contrary to the intent of the Legislature; and thus, the statute would create arbitrary and discriminatory

enforcement. The State objects to the district court's analysis on two grounds.

First, the district court failed to determine whether NRS 453.322(1)(b) is vague as applied to the defendants in this particular case. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983)(citations omitted). However, "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975); see also United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963)("[i]n determining the sufficiency of the notice a statute must, of necessity, be examined in the light of the conduct with which a defendant is charged"). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974); see also Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law"). As Nevada has described it, "statutes challenged for vagueness are evaluated on an as-applied basis where, as here, first amendment interests are not implicated." Lyons v. State, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989).

Here, the district court failed to determine whether the defendants' conduct was sufficient to violate NRS 453.322(1)(b). Normally, a trial is required to determine whether a defendant's conduct has violated the law. See, e.g., United States v. Saffo, 227 F.3d 1260, 1270 (10th Cir. 2000)("We hold that the evidence produced at trial demonstrated that Saffo is 'one to whose conduct [the] statute clearly applies'; therefore she cannot successfully challenge the

statute for vagueness."). Here, however, the facts at this point demonstrate that the defendants possessed a complete methamphetamine laboratory and all the ingredients necessary to make the drug. Thus, they possessed a majority of the ingredients necessary to manufacture a controlled substance in violation of NRS 453.322(1)(b). This is not a situation where the defendants "could not reasonably understand that [their] contemplated conduct is proscribed." Parker v. Levy, 417 U.S. 733, 757 (1974)(quoting United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963)).[2] Accordingly, this

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[2]Although the defendants waived their preliminary hearing, the State made an offer of proof in its opposition to the motion to dismiss as to what evidence it believed it had at that point:

> Indicia of occupancy in the names of Donna Delany and Steve Santillanez; a 750 ml glass bottle containing approximately one half inch of brown liquid, having a P/H of 0.1 and non-flammable; an 18 ounce plastic bottle approximately half full with a white granular substance, with a P/H of 14 and testing positive for a corrosive when water was added; a four ounce clear glass jar approximately half full with a brown liquid, testing positive as flammable and an oxidizer; a three ounce glass pitcher with a screw-on lid wrapped in electrical tape containing a residue of a gray metallic solid, a two ounce jar containing a dark gray metallic residue testing positive as an oxider; a four inch plastic wide mouth jar with the original marking "Phosphorous, Red" containing three coffee filters with wet red/brown solid contained inside and a six inch by three inch ziplock plastic bag with a red/brown solid contained inside, the solid was

Court should reverse the district court order dismissing the charge and remand the case to the district court for trial.

> found to be flammable; a one quart metal can with "Tone" written on the outside, inside as a clear liquid testing to be flammable; a six cup coffee pot containing approximately one inch of light pink liquid; a one quart metal can with the original markings "denatured Alcohol" containing a clear liquid which was found to be ignitable; a sixteen ounce clear plastic soda bottle approximately half full of a light tan liquid found to be flammable; a six ounce jar containing approximately 1/2 inch of a light brown liquid found to be flammable; and a one gallon plastic jug approximately 1/4 full of a clear liquid; a glass beaker; eight water glasses containing a white residue; a single burner hotplate; a "Goldsloger" bottle with tubing attached to the top and containing a dark colored liquid solution; aluminum foil; electric fan; one glass jar with light residue stain; a cloth with red stains; a white coffee pot; stained tubing; a flask, a scale, used coffee filters wet with white residue and yellow stains; a coffee grinder containing white residue, a coffee pot; a glass smoking pipe; three plates with glass residue; and, two new red plastic gas cans. Chemical samples were gathered from the scene and submitted to the Washoe County Crime Lab, resulting in the verification that the following chemicals were found: iodine, ephedrine, pseudoephedrine, red phosphorous, hydrochloric acid, and methamphetamine. (Exhibit A.)

(JA, 18-20).

Finally, "[s]tatutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality." Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991). In vagueness challenges, a statute may be struck down as vague on its face only if it is impermissibly vague in all of its applications. See Hoffman Estates, 455 U.S. at 494-95. Here, the district court failed to demonstrate there is no case where a person of average intelligence would not understand that the substances she possesses are a majority of the ingredients required to manufacture a controlled substance, and that it is unlawful to possess those ingredients.

V. ARGUMENT

For the foregoing reasons, the State respectfully requests this Court to reverse the district court's order granting respondents' motion to dismiss and to remand this matter for trial.

DATED: November 19, 2001.

RICHARD A. GAMMICK
District Attorney

By s/Joseph R. Plater
JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19 day of November, 2001.

s/Joseph R. Plater
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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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DATED: November 19, 2001

s/Linda Jackling